SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 22 1965
JOHN F. DAVIS, CLERK

No. 1094

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Petitioners,

vs.

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DAVID BLAND,
SIDNEY FARR,
Attorneys for Petitioners.

Of Counsel:
BARROW, BLAND, REHMET & SINGLETON
12th Floor, The Main Building
1212 Main Street
Houston 2, Texas

INDEX

PAGE

Citations to opinions below 2

Statement of the grounds on which jurisdiction of this Court is invoked 2

The questions presented for review 3

Statement of the case 8

The Federal and Constitutional issues were raised by petitioners at their first opportunity 20

The important questions of the local law of Texas decided by both the trial judge and the Court of Appeals in a manner directly in conflict with the statutes and decisions of Texas 21

Reasons relied upon for the granting of the writ 23

Conclusion 26

Prayer for petition for writ of certiorari 27

Appendices:

Appendix I—Proceedings of December 13, 1963 App. 1

Appendix II—Opinion .....App. 5

Appendix III—Judgment .....App. 24

Appendix IV—Order on petition for rehearing App. 26

AUTHORITIES CITED

Cases

PAGE

Anderson National Bank v. Luckett, 321 U.S. 233 20

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 23

Brinkerhoff-Faris Trust & Savings Co., v. Hill, 281 U.S. 673 21

Chicopee Mfg. Corp. v. Kendall Co., 288 F. 2d 719, cert. den. 368 U.S. 825 19

Commissioner v. Duberstein, 363 U.S. 278, at 292-3 .. 25

Dalehite v. U.S., 346 U.S. 15 17

Edward Valves, Inc. v. Cameron Iron Works, Inc., 289 F. 2d 355, at p. 356 (5 C.C.A.) 18

Erie R. Co. v. Tompkins, 304 U.S. 64 23

Griffin v. McCoach, 313 U.S. 498 23

In re Woodmar Realty Co., 307 F. 2d 591 18

Kelly v. Everglades Drainage District, 319 U.S. 415 17

Kinnear-Weed Corp. v. Humble Oil & Refining Co., 259 F. 2d 398, cert. den. 361 U.S. 903, 368 U.S. 90 (5 C.C.A.) 18

Klaxon Co. v. Stentor Mfg. Co., 313 U.S. 487 23

Lee v. Fleming, 158 F. 2d 984 (U.S. Ct. App.), cert. den. 331 U.S. 805 20

Lipman v. Arlington Seating Co., 192 F.2d 93 15

Louis Dreyfus & Cie v. Panama Canal Co., 298 F. 2d 733 18

Matton Oil Transfer Corp. v. The Dynamic, 123 F. 2d 999 (2 C.C.A.) 18

PAGE

Mayo v. Lakeland Highlands Can Co., 309 U.S. 311 17

Meredith v. Winterhaven, 320 U.S. 228 20

Missouri v. Gehner, 281 U.S. 313 21

Monaghan v. Hill, 140 F. 2d 31 15

Morgan v. U. S., 304 U.S. 1 20

Myles v. Quinn Menhaden Fisheries, Inc., 302 F. 2d 146 (5 C.C.A.) 18

N.L.R.B. v. Ford Motor Co., 114 F. 2d 905 (6 C.C.A.) cert. den., 312 U.S. 689 20

N.L.R.B. v. Phelps, 136 F. 2d 562 (5 C.C.A.) 20

Pittsburgh S.S. Co. v. N.L.R.B., 167 F. 2d 126 (6 C.C.A.) 20

Public Service Com. v. Wisconsin Tel. Co., 289 U.S. 67 17

Railroad Com. of Wis. v. Maxcy, 281 U.S. 82 17

Railroad Com. of Cal. v. Pacific Gas & Elec. Co., 302 U.S. 388 20

Rosenberg v. Baum, 153 F. 2d 10 (10 C.C.A.) 20

Saunders v. Shaw, 244 U.S. 317 21

Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82, at p. 84 19

Smithers v. Smith, 204 U.S. 632 20

Tanker Hygrade No. 24 v. The Dynamic, 213 F. 2d 453 18

Tax Commissioners v. Jackson, 283 U.S. 527 17

U. S. v. Crescent Amusement Co., 323 U.S. 173, at p. 185 18

PAGE

U. S. v. Forness, 125 F. 2d 928, cert. den. 316 U.S. 694 (2 C.C.A.) 17

Winter Park Telephone Co. v. Southern Bell Tel. & Tel. Co., 181 F. 2d 341 (5 C.C.A.) 18

Other Authorities

U.S.C.A. Tit. 28, Sec. 1254(1) 2

U.S.C.A. Tit. 28, Sec 1332(a) (1) 2

Fifth Amendment of the Federal Constitution 3, 4, 19-20

Federal Rule 52(a) 3, 4, 10, 11, 15, 24

Federal Rule 52(b) 15, 24

Federal Rule 58 .....13, 19

Federal Rule 59 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

EDWIN K. ATWOOD, ALICE B. ATWOOD, RICHARD W. ATWOOD, N.C.M., by ALICE B. ATWOOD, as His Next Friend and Conservatrix, and ALICE B. ATWOOD, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., THOMAS H. FISHER and RUTH P. FISHER,

Petitioners,

VS.

HUMBLE OIL & REFINING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners Edwin K. Atwood, Richard W. Atwood, N.C.M., by Alice B. Atwood, as his next friend and Conservatrix, Alice B. Atwood, as Conservatrix of the Estate of Richard W. Atwood, N.C.M., Thomas H. Fisher and Ruth P. Fisher, respectfully pray this Court's writ of certiorari to review and reverse or vacate the decision of the United States Court of Appeals for the Fifth Circuit in this case, and to remand the case to the District Court for further proceedings in that court.

CITATIONS TO OPINIONS BELOW.

The District Court of the United States for the Southern District of Texas, Houston Division, did not render any formal opinion in this case. However, since this petition is based in part upon the trial judge's utter abdication of his judicial duty to decide the case himself, and upon the Court of Appeals' affirmance of the trial court's final decree, we append a transcript of the informal remarks or informal opinion of the trial judge as Appendix I hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in 338 F. 2d 502, and is reprinted in full as Appendix II to this Petition.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The opinion of the Court of Appeals was filed and its judgment was rendered on November 19, 1964. Petitioners' Petitions for Rehearing were denied without a supplemental opinion on January 26, 1965. This petition is filed within 90 days thereafter, in this Court.

This Court's jurisdiction is invoked under Section 1254(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1254(1)) which confers upon this Court jurisdiction to review decisions of the United States Court of Appeals.

The United States District Court's jurisdiction was based upon diversity of citizenship, under Section 1332(a)(1) of the United States Judicial Code (U.S.C.A. Tit. 28, Sec. 1332(a)(1)).

THE QUESTIONS PRESENTED FOR REVIEW.

The questions for review are:

1. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the trial judge wholly failed to perform his judicial duty when, instead of finding the facts specially and stating his conclusions of law thereon separately as required by the mandatory provisions of Federal Rule 52(a), he first directed the trial counsel for defendant (respondent) to "perform the detail work" of drafting *whatever findings of fact and conclusions of law respondent's counsel wished without any guidance from the trial judge himself* (except a passing reference to prior irrelevant litigation, of which there was no evidence in this case, because the trial judge had excluded it), and then, after respondent's counsel had submitted findings and conclusions prepared without any such guidance, the trial judge signed the same mechanically and without any change *as though they had been the result of his own judicial action when, in fact, they were solely the product of respondent's counsel, who was in reality deciding every fact and legal conclusion in this case in his own client's favor?*

2. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the trial judge made a "blanket" decision of this entire case solely upon the basis of his "feeling" about certain prior litigation between some of the parties *which had nothing whatever to do with any of the issues in this case*, after he had excluded at the trial of this case all evidence (which had been tendered by defendant (respondent)) concerning such irrelevant prior litigation?

3. Were petitioners deprived of their right to due process of law under the Fifth Amendment to the Federal Constitution, because the Court of Appeals affirmed the judgment entered by the trial judge upon the fallacious ground that the petitioners had supposedly failed to "assist the trial judge" by suggesting changes in those findings and conclusions which had been authored solely by Humble's counsel before they were mechanically adopted without change by the trial judge, despite Federal Rule 52(a) and (b) which explicitly provides that no such assistance to the trial judge was required of plaintiffs (petitioners) and despite the plaintiffs' timely motion for new trial and amendment of judgment filed under Federal Rule 59, which pointed out the errors in the findings and conclusions?

4. Did both the trial judge and the Court of Appeals decide important questions of the local law of Texas in a manner directly in conflict with the applicable statutes and decisions of Texas, by holding

(a) That the plain meaning of an unambiguous mineral lease between the parties made in 1933 should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their mineral property rights of a value of many millions of dollars, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(b) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to recover monetary damages from the mineral lessee (respondent) which the mineral lessors

(petitioners) suffered from the breach by the mineral lessee (respondent) of its covenant in the mineral lease requiring it to produce a certain minimum quantity of oil and gas from the leased premises, but which minimum quantity it failed to produce, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(c) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to demand and receive delivery *in the future* from the mineral lessee (respondent) of the mineral lessors' (petitioners') owned share of physical oil *in kind* to be produced from the leased premises, despite the fact that the entire title to such share of physical oil *in kind* was expressly reserved to the mineral lessors (petitioners) under the explicit terms of the mineral lease;

(d) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to reasonable development of their minerals by the mineral lessee (respondent) under the express covenant requiring such mineral development contained in the mineral lease, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(e) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (peti-

tioners) of their right to recover monetary damages from the mineral lessee (respondent) suffered by the mineral lessors (petitioners) as a result of the mineral lessee's (respondent's) conversion of the mineral lessors' (petitioners') owned physical oil *in kind* of a value of many thousands of dollars, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(f) That the plain meaning of an unambiguous mineral lease between the parties should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their right to recover monetary damages from the mineral lessee (respondent) which the mineral lessors (petitioners) suffered as a result of the breach by the mineral lessee (respondent) of the express covenant in the mineral lease requiring the mineral lessee (respondent) to advance income tax moneys to the mineral lessors (petitioners), without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(g) That the plain meaning of two unambiguous contracts made in 1949 and 1950 providing for the sale by the mineral lessors (petitioners) of all of their physical oil *in kind* which had been produced between specified dates by the mineral lessee (respondent) from the leased premises, and the purchase of such oil by the mineral lessee (respondent), should be so distorted (in violation of Texas law) as to deprive the mineral lessors (petitioners) of their royalty rights under the mineral lease made in 1933, upon the fallacious theory that *payment of the purchase price* of such physical oil *in kind* under these two 1949 and

1950 contracts constituted *payment of royalty* under the 1933 mineral lease, despite the express provisions of the two 1949 and 1950 contracts which precluded any right of the mineral lessee (respondent) to have *the purchase price* of the mineral lessors' (petitioners') oil applied as a credit upon the mineral lessee's (respondent's) obligation to pay *royalty* under the 1933 mineral lease, without granting the mineral lessors (petitioners) any equivalent monetary compensation or any other relief from the mineral lessee (respondent);

(h) That the mineral lessors (petitioners) were not entitled to recover any interest upon the monetary damages to which they were entitled from the mineral lessee (respondent) (in accordance with Texas laws) by reason of the mineral lessee's (respondent's) breaches of the mineral lease and the two written purchase contracts aforesaid?

STATEMENT OF THE CASE.

This case involves a dispute over whether the defendant, Humble Oil & Refinery Company (respondent), as lessee, breached in eight major particulars the provisions of a valid mineral lease made in 1933 of plaintiffs' (petitioners') minerals, which breaches resulted in the plaintiffs' loss of many millions of barrels of oil and cubic feet of gas, and caused damages amounting to several million dollars to the petitioners (R. 805-815).

Prior litigation between certain (but not all) of the plaintiffs (petitioners) and the defendant, Humble, had decreed with finality in 1953 that this mineral lease was valid and binding upon both lessors and lessee (R. 257-9). In other words, at the time when this suit was filed (in 1954), more than a year had elapsed since the prior litigation over the *validity* of the mineral lease had terminated (in 1953). The sole and only ground for the relief sought in this suit was that the mineral lessee (respondent) had breached various separate covenants contained in the *valid* mineral lease, and also two separate contracts for the purchase and sale of certain oil *in kind* produced from the leased premises and owned by plaintiffs (petitioners), over which two separate contracts there had never been *any* prior litigation. No issue as to the *validity* of the mineral lease (the *only* issue actually decided in the prior litigation) was ever raised in this case (R. 805-815).

During the trial of this case in the District Court in Houston, Texas, the trial judge sustained the plaintiffs' objections to all evidence, tendered by the defendant (Humble), relative to certain litigation between certain of the parties to this action, rightly ruling: "We are only

trying *this case* here" (R. 471-2). At the same time, the trial judge also sustained plaintiffs' motion to exclude from the trial record in this case all of the evidence of such prior litigation which was tendered by Humble (DX 21-35; R. 207-9, 611-621). *Thus there was no evidence whatsoever in this case as to what were the issues which were either raised or decided in any prior litigation.*

After the completion of the trial of this case, and after all issues of both fact and law had been voluminously briefed by the counsel for the opposing parties, the trial judge called the parties into his court room to announce his decision in the case (R. 819-822) (See Appendix I hereto). Instead of making his own judicial determination of any of the many and complex issues of fact and of law raised by the litigants as the result of his own independent judicial labors and study, the trial judge merely announced his "blanket" finding of "all issues in favor of the defendant" (R. 820), and then assigned to defense counsel for Humble the job of preparing whatever findings and conclusions to support this "blanket" determination Humble's counsel wished (R. 820-1). Since the trial judge himself gave no specific or other reasons for holding as he did (other than his vague "feelings" about undefined prior litigation, as to which there was no proof in the record), what his assignment to Humble's counsel really amounted to, therefore, was not just asking winning counsel's help in putting his own findings and conclusions on paper, but to decide every fact and legal issue issue under Texas law, and thus to formulate as well the entire rationale of the decision itself, a judicial function pure and simple which should have been performed by the trial judge alone.

In other words, when the trial judge totally ignored the mandatory requirements of Federal Rule 52(a), as well as the many decisions both of this Court and of the Courts of Appeal enforcing these mandatory Federal Rules, and without any other guidance to Humble's counsel than a mere general reference to *the undefined prior irrelevant litigation* by which the trial judge vaguely said he "felt" bound "to some extent," accompanied by the injunction that Humble's counsel be "realistic on the evidence" (whatever that meant) (R. 821), *the trial judge totally abdicated his judicial function to decide the case himself, as a result of his own travail and his own independent judicial labors and study.*

Here is everything upon which the trial judge based his final blanket decision:

> "I *felt* during the trial and *now feel* after reading the briefs and reviewing the evidence that *the defendant* [*Humble*] *should prevail in this litigation. This is just one of the several disputes litigated by these plaintiffs. Plaintiffs have failed in all of them and I feel that I am bound to some extent by the prior adjudications.* (R. 819)
>
> • • •
>
> "Considering the evidence in this case, it is my opinion that the lessee [Humble] had the right under the express provisions of Paragraph 2 of the [mineral] lease to make the designation of the retained minerals that it did make. [This was only one of the eight issues in the case.] I find all [eight] issues in favor of the defendant [Humble] *and I request that defendant's counsel perform the detail work in drafting findings of fact and conclusions of law, consistent with these comments and the evidence. Counsel* [*for respondent, Humble*] *will also draft and submit judgment.* (R. 820)
>
> • • •

> "Of course I want your [Humble's counsel's] findings and conclusions to be *realistic on the evidence* . . ." (R. 821) (Emphasis supplied.)

The final phrase "realistic on the evidence" with reference to both facts and legal conclusions shows that the trial judge was in reality saying: "Please support my blanket conclusion in your client's (Humble's) favor without any help from me."

There were eight important and entirely separate issues of fact and law, involving several million dollars in money as well as the ownership of many millions of barrels of oil and many millions of cubic feet of gas, all of which eight separate issues had been submitted to the trial court as succinctly described in the pretrial order (R. 805-815). Nevertheless the trial judge did not in his oral opinion *find one single fact specially* (even to support his decision of what he called "the principal dispute"), nor did he *state separately one single conclusion of law based on the facts,* to support his decision either of what he called "the principal dispute" or any of the other seven separate important issues between the parties.

What the foregoing conclusively shows is, *first,* that the trial judge did not advance the ends of justice by complying with the mandatory requirements of Federal procedure as laid down in Federal Rule 52(a) by performing his own judicial function and duty to determine all of the special facts and decide all of the separate legal issues based thereon. Instead of being the judicial umpire, he simply walked off the field, telling one team (Humble) that it was to be the victor on whatever grounds it liked.

It shows, *second,* by the trial judge's own oral remarks or opinion, that he was basing his blanket decision in Humble's favor upon the supposed results of certain undefined and unidentified prior litigation, despite the fact

that he had himself deliberately excluded during the trial all evidence tendered thereon by Humble, and also despite the undeniable fact that the prior litigation, which affected only a part of the parties to this action, was *totally irrelevant to any issue in this action,* since it concerned only the *validity* of the mineral lease, whereas this case involved *only* claimed breaches of the mineral lease (as an admittedly valid lease) by the mineral lessee (Humble).

Indeed, the trial judge's own oral remarks or opinion show that he was deciding this case as he did only because he vaguely "felt" himself bound to *some* extent by *some* prior adjudications, *although what prior adjudications he meant and to what extent he "felt" himself bound by them, or why he had this "feeling,"* he utterly failed to explain in his oral opinion. Accordingly, Humble's counsel decided this case in Humble's favor without the slightest basis in any prior litigation, and without the slightest help from the trial judge's opinion, as shown by the Findings of Fact and Conclusions of Law prepared by Humble's counsel (R. 825-834).

In simple words, the trial judge, *instead of acting as the judge in the case and deciding it himself as he should have done,* instructed the defendant's counsel to decide all of the issues in the case in whatever manner appealed to Humble's counsel, so long as the over-all decision was in Humble's favor, thus leaving Humble's counsel completely free to prepare and present to the trial judge whatever factual and legal determinations in favor of his own client (Humble) he saw fit. And when Humble took advantage of this opportunity, it completely ignored the absence of any evidence of the undenied and unproven prior litigation, although that was *the only ground* for the trial judge's blanket decision. A greater travesty on justice can rarely if ever have occurred in a Federal Court.

When these findings and conclusions, which were not in truth authored by the trial judge but were wholly authored by Humble's counsel, were presented to the trial judge on the last day of the year 1963, the trial judge mechanically adopted them by signing them without any change whatsoever; and at the same time he entered the final judgment to the effect "that the plaintiffs take nothing," and "that the action is dismissed on the merits" (R. 825-835) which had been prepared and submitted by Humble's counsel, despite Federal Rule 58 which forbids such submission of a final judgment by counsel except under special circumstances.

The Court of Appeals attempted to justify its opinion and decision affirming the trial judge by obliquely dragging in the prior irrelevant litigation in both the Federal and Texas courts, of which there was no proof whatever in the record, by saying (p. 3):

> "This is the latest, and should be the last, in a long series of protracted litigations concerning the King Ranch and the King Ranch [mineral]."

The two Federal cases, which were referred to in the footnote No. 2 and which had been decided by the same Court of Appeals, the first more than 20 years before, and the second more than 18 years before, were totally irrelevant and totally unproven in the record, and no reference to them appears in the findings and conclusions prepared by Humble's counsel (R. 825-834). The Texas state court cases (only one of which was referred to, quite wrongly, as having "interpreted" the mineral lease (R. 832)) were just as irrelevant and unproven in the record as the Federal cases. As was correctly pointed out in petitioners' motion to amend the Court of Appeals' opinion and petition for rehearing, there was not only no justifi-

cation whatever for attempting to drag this totally irrelevant and unproven prior litigation on other issues into its opinion and decision in this case, but *the Court of Appeals' completely gratuitous admonition against any future litigation between the parties* was an open invitation to Humble to continue to breach the lease in the future, so long as the mineral lease should continue to be operative on the leased premises, exactly as it had breached it in the past.

As an illustration, petitioners carefully pointed out in their motion and petition that Humble had for ten years totally and deliberately breached the reasonable development covenant contained in the mineral lease, by failing to drill even a single one of the wells which the uncontradicted evidence showed a reasonable and prudent operator would and should have drilled on the retained acreage *as the lease expressly required,* and that in fact Humble had also threatened in its reply brief in the trial court to conduct *no future development required of it* under the express reasonable development covenant until it should have what it called an opportunity to re-examine all the geological information applicable to the plaintiffs' properties, which was a mere euphemism for an anticipatory breach of the lease by Humble's refusal in its reply brief to drill any *future* development or discovery wells on the leased premises until it should get good and ready to do so.

The plaintiffs (petitioners), fearing that they might in some way be acknowledging the propriety of the action of Humble's counsel as sole author of the findings and conclusions in the place of the trial judge, and also having in mind the very extensive briefs which they had carefully prepared and filed to aid the trial court in making his decision, but which he had utterly ignored in his oral

opinion, as well as Federal Rule 52(a) and (b) which exculpated them of any duty to do anything more to aid the court, filed no preliminary attack upon these proposed findings and conclusions which had been solely authored by Humble and then presented to the trial judge. However, plaintiffs timely filed under Federal Rule 59 their motion for a new trial, amendment of findings, making of additional findings, and amendment of judgment (R. 836-840), within ten days after the trial judge had adopted Humble's findings and conclusions and had entered his judgment in the form prepared by Humble (R. 836-840), although plaintiffs were under no obligation or duty to do so. The trial judge peremptorily denied this motion on the day after petitioners presented it (R. 843).

The Court of Appeals thus acted contrary to Federal law when it attempted to base its affirmance of the trial judge's decree upon the supposed breach by plaintiffs' counsel of a non-existent duty to assist the trial court in making complete and accurate findings, as codified by the provisions of Federal Rule 52(a) and (b) which explicitly provide that neither requests for, nor objections to, a trial court's findings are a necessary prerequisite to a review of its findings on appeal. *Monaghan* v. *Hill,* 140 F. 2d 31; *Lipman* v. *Arlington Seating Co.,* 192 F. 2d 93.

The Court of Appeals' opinion also erroneously said that plaintiffs' whole argument rested on the "unwarranted assumption" that the district judge failed to perform his duty of making findings and conclusions to support the judgment. There was nothing "unwarranted" about this so-called "assumption." The indubitable fact was that the trial judge did wholly fail in performing his judicial duty in this crucial respect, thereby totally ignoring not only the mandatory provisions of Federal Rule 52(a) but the requirements of ordinary due process of law as well.

On this same subject the Court of Appeals' opinion also said:

> "By *assuming* that the findings do not represent the real determination and conclusions of the trial court, but were merely spoon-fed to the court, the plaintiffs . . . make an *unwarranted assumption* that finds no support in the record." (Emphasis supplied.)

For the reasons already stated, plaintiffs' so-called "assumption" was neither unwarranted nor unfounded, for the fact that the trial judge made no real determination of any facts or any conclusions based thereon is conclusively established by the record (R. 819-822). On the contrary, the findings and conclusions were "spoon fed" to the trial judge, at his own invitation.

In conclusion, the Court of Appeals' opinion, without the slightest justification, charged the plaintiffs with improperly questioning the "integrity" of the trial court. This was a totally unjustified attack upon plaintiffs and their counsel. Not only in the plaintiffs' original briefs but also in their motion to amend the Court of Appeals' opinion and petition for rehearing, the petitioners made it perfectly plain that they were *not* impugning or questioning the "integrity" of the trial judge. Petitioners said in their original brief:

> "We regret that duty to our clients requires us to question in this appeal, as one of our principal grounds for reversal, the manner in which the trial court finally disposed of the issues in this action. While we have the highest regard for the trial judge, both professionally and otherwise, we believe that in this case he abandoned his judicial office to the prevailing counsel, without realizing the effect of his actions."

Also in their same brief petitioners also said:

> "The totally unsupported judgment of 'all issues' in favor of one litigant, in this case Humble, is in itself evidence of prejudgment or 'legal' prejudice within the purview of the decisions on the subject, no matter that the trial court was obviously unconscious of it himself, and this was enough to deprive plaintiffs of due process of law under the Fifth Amendment. *N. L. R. B.* v. *Phelps,* 136 F. 2d 562, decided by this Court in 1943; *N. L. R. B.* v. *Ford Motor Co.,* 114 F. 2d 905 (6 Cir. 1940), cert. den. 312 U.S. 689; *Lee* v. *Fleming,* 158 F. 2d 984 (U.S. Emergency Ct. of App. 1946), cert. den. 331 U.S. 805; *Pittsburgh S.S. Co.* v. *N. L. R. B.,* 167 F. 2d 126 (6th Cir. 1948). We say this respectfully and not maliciously, because one of the distinguishing qualities that this trial judge has consistently displayed on the bench is fairmindedness; and there can be no doubt that he intended and believed himself to be completely fairminded in this case."

In sum, what the foregoing shows is, *first,* that plaintiffs were deprived of due process of law by the trial judge's complete abdication of his judicial duty to decide this case himself; and *second,* that the trial judge deliberately breached his mandatory duty to make special findings of fact and separate conclusions of law as required by Federal Rule 52(a).

Thus the decisions of the District Court and the Court of Appeals in this case are directly and squarely in conflict with the decisions of this Court and the same and other Courts of Appeal. *Mayo* v. *Lakeland Highlands Can Co.,* 309 U.S. 311; *Kelly* v. *Everglades Drainage District,* 319 U.S. 415; *Dalehite* v. *U. S.,* 346 U.S. 15; *Tax Commissioners* v. *Jackson,* 283 U.S. 527; *Public Service Com.* v. *Wisconsin Tel. Co.,* 289 U.S. 67; *Railroad Com. of Wis.* v. *Maxcy,* 281 U.S. 82; *U. S.* v. *Forness,* 125 F. 2d 928, cert.

den. 316 U.S. 694, decided in 2 C.C.A., and cited with approval in *U. S.* v. *Crescent Amusement Co.*, 323 U.S. 173, at p. 185, and by the 5 C.C.A. in *Edward Valves, Inc.* v. *Cameron Iron Works, Inc.*, 289 F. 2d 355, at p. 356; *Winter Park Telephone Co.* v. *Southern Bell Tel. & Tel. Co.*, 181 F. 2d 341 (5 C.C.A.); *In re Woodmar Realty Co.*, 307 F. 2d 591. In *Matton Oil Transfer Corp.* v. *The Dynamic*, 123 F. 2d 999, the 2 C.C.A. condemned findings "prepared by winning counsel after the event," citing the *Mayo, Interstate* and other cases. And in the *Edward Valves* case, the 2 C.C.A. condemned the "mechanical adoption" of an attorney's suggested findings by the trial judge. In *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 259 F. 2d 398, cert. den. 361 U.S. 903, 368 U.S. 90, the 5 C.C.A. insisted that the trial judge's findings and conclusions should "represent the independent judicial labors and study of the district judge," which requirement the same 5 C.C.A. repeated in *Louis Dreyfus & Cie* v. *Panama Canal Co.*, 298 F. 2d 733.

The 5 C.C.A. cited in the *Dreyfus* case the case of *The Severance*, 152 F. 2d 916, cert. den. 328 U.S. 853, in which the 4 C.C.A. said of findings and conclusions prepared by winning counsel: "This practice is not to be commended," because such findings and conclusions are not "entitled to the same weight and dignity" as those representing "the unfettered and independent judgment of the trial judge." And in *Tanker Hygrade No. 24* v. *The Dynamic*, 213 F. 2d 453, the 2 C.C.A. held that the findings and conclusions of the trial judge should "give unmistakable evidence that he has prepared them as a result of his own independent study and research." In *Myles* v. *Quinn Menhaden Fisheries, Inc.*, 302 F. 2d 146, the 5 C.C.A. said, citing the *Dreyfus* case, that the trial judge should speak "from his own travail," thereby avoiding "the process of adopting verbatim those [findings and conclusions] proposed by counsel."

In *Chicopee Mfg. Corp.* v. *Kendall Co.*, 288 F. 2d 719, cert. den. 368 U.S. 825, the 4 C.C.A. said that "there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side," and: "That practice involves the failure of the trial judge to perform his judicial function and when it occurs without notice to the opposing side, as in this case, it amounts to a denial of due process."

We are not saying that a trial judge may not obtain the aid of winning counsel in preparing his findings and conclusions, for there are many cases holding he may do so, *provided, however,* that the findings so made "shall be those of the trial judge *himself.*" *Schilling* v. *Schwitzer-Cummins Co.*, 142 F. 2d 82, at p. 84. The findings of the trial judge in the case at bar were Humble's findings and *not* "those of the trial judge himself."

As recently as July 1, 1963, Federal Rule 58 was amended to provide:

> "Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

Such amendment obviously intended that the trial judge himself, and *not* the attorneys, should be the sole author of the final judgment in the case, except in some unusual circumstance, absent in the case at bar. When the trial judge, without finding any special circumstances, directed Humble's counsel to prepare the final decree in this case (R. 820), he plainly violated the Amended Rule 58.

For further cases holding that when, as in this case, the trial judge has said that he "felt" during the trial that one party (Humble) should prevail upon "all issues," thereby prejudging it (R. 819), the other party has thereby been deprived of due process of law under the Fifth

Amendment, see *Rosenberg* v. *Baum,* 153 F. 2d 10 (10 C.C.A.); *N. L. R. B.* v. *Phelps,* 136 F. 2d 562 (5 C.C.A.); *N. L. R. B.* v. *Ford Motor Co.,* 114 F.2d 905 (6 C.C.A.), cert. den. 312 U.S. 689; *Lee* v. *Fleming,* 158 F. 2d 984 (U.S. Ct. App.), cert. den. 331 U.S. 805; *Pittsburgh S.S. Co.* v. *N. L. R. B.,* 167 F. 2d 126 (6 C.C.A.).

This Court has often held that plaintiffs who have properly invoked the diversity jurisdiction of the District Court have a constitutional right to have their claims properly adjudicated there (*Smithers* v. *Smith,* 204 U.S. 632; *Meredith* v. *Winterhaven,* 320 U.S. 228; etc.), and to a "day in court" (*Railroad Com. of Cal.* v. *Pacific Gas & Elec. Co.,* 302 U.S. 388; *Morgan* v. *U. S.,* 304 U.S. 1; *Anderson National Bank* v. *Luckett,* 321 U.S. 233; etc.).

The attempt in the Court of Appeals' opinion to cover up the grave dereliction of the district judge, by maintaining (a) that the prior irrelevant and unproven litigation "should be the last," (b) that the plaintiffs had breached a supposed but non-existent duty to assist the trial judge by objecting to the findings and conclusions authored solely by winning counsel, (c) that plaintiffs had made what was only an "unwarranted assumption" that the trial judge had failed in properly performing his judicial duty, and (d) that plaintiffs had thereby improperly questioned the "integrity" of the trial judge, cannot defeat the conclusion that the trial judge's dereliction of judicial duty, as sanctioned and approved by the Court of Appeals, constituted a plain violation of the most basic principles of Federal law.

The Federal and Constitutional Issues Were Raised By Petitioners at Their First Opportunity.

Their contention that the foregoing acts by the trial court and the Court of Appeals constituted a violation of Federal law and deprived petitioners of their right to due

process of law under the Fifth Amendment to the Federal Constitution was timely raised by petitioners at their first opportunity in the Court of Appeals. *Saunders* v. *Shaw,* 244 U.S. 317; *Missouri* v. *Gehner,* 281 U.S. 313; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673; etc.

THE IMPORTANT QUESTIONS OF THE LOCAL LAW OF TEXAS DECIDED BY BOTH THE TRIAL JUDGE AND THE COURT OF APPEALS IN A MANNER DIRECTLY IN CONFLICT WITH THE STATUTES AND DECISIONS OF TEXAS.

The record in this case shows that both the trial judge and the Court of Appeals decided important questions of local law of Texas in a manner directly in conflict with the Texas statutes and decisions, in the following respects:

1. The plain and unambiguous meaning of the mineral lease between the parties was so distorted as to deprive the mineral lessors (petitioners) of their mineral property rights worth many millions of dollars, without granting petitioners any equivalent monetary compensation or other relief.

2. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive the mineral lessors (petitioners) of their right to recover monetary damages suffered by them as a result of the plain breach by Humble of its covenant in the mineral lease requiring it to produce a certain minimum quantity of oil and gas from the leased premises, without granting any equivalent monetary compensation or other relief to the petitioners.

3. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to demand and receive delivery *in future* of their owned share of the physical oil *in kind* recovered by Humble from the leased premises.

4. The plain and unambiguous meaning of the mineral lease was so distorted as to exculpate Humble from its obligation under the express reasonable development covenant of the lease, without granting petitioners any equivalent monetary compensation or other relief.

5. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to recover monetary damages resulting from Humble's conversion of the physical oil *in kind* owned by petitioners, without granting petitioners any equivalent monetary compensation or other relief.

6. The plain and unambiguous meaning of the mineral lease was so distorted as to deprive petitioners of their right to recover monetary damages resulting from Humble's plain breach of its covenant to advance income tax moneys to petitioners, without petitioners' receiving any equivalent monetary compensation or other relief.

7. The plain and unambiguous meaning of the entirely separate contracts, entered into between the parties to the lease 16 and 17 years after the lease was made, providing for the purchase by Humble and the sale by petitioners of certain physical oil *in kind* owned by petitioners which had been extracted from the leased premises was so distorted as to deprive petitioners of their royalty rights under the lease, upon the fallacious theory that the payment of the purchase price for petitioners' physical oil *in kind* constituted payment by lessee of royalty under the mineral lease, without petitioners receiving any equivalent monetary compensation or other relief.

8. Petitioners were deprived of their right to recover interest upon the money damages to which they were entitled by reason of Humble's plain breaches of the mineral lease and the two separate written contracts above mentioned.

Insofar as the decisions of both the trial court and the Court of Appeals determined each of the foregoing issues, such decisions constituted an adjudication of important questions of local Texas law in a manner in conflict with the Texas statutes and the Texas applicable decisions. This is a grave violation of Federal law. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64; *Klaxon Co.* v. *Stentor Mfg. Co.,* 313 U.S. 487; *Griffin* v. *McCoach,* 313 U.S. 498; *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425.

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

The plain fact is that in this case the trial judge not only totally ignored his judicial duty under Federal Rule 52(a), which in mandatory language required him to find the facts specially and to state his conclusions of law separately thereon (a failure which has been repeatedly held by many decisions of this Court and of the Court of Appeals to require a reversal and remand with directions that such findings and conclusions be made by the trial judge), but instead the trial judge deliberately turned over the entire decision of this case and the determination of the grounds therefor to counsel for the respondent, Humble Oil & Refining Company, without giving any guide to Humble's counsel as to how to do what the trial court described as this "detailed work," other than the injunction that Humble's counsel "be realistic on the evidence," which was no real guide at all.

Moreover, the Court of Appeals, instead of dealing with this subject on its merits, improperly attempted to justify the trial judge's action upon the ground that there had been prior litigation between some of the litigants, though without pointing out that there was no evidence of any

prior adjudications in this case, and that every one of the issues in these prior Federal and Texas cases was totally irrelevant to the issues in this case.

Also the Court of Appeals unjustly accused the petitioners of failing to give any assistance to the trial court in making complete and accurate findings, despite the extensive briefs previously filed by the plaintiffs with the trial judge, and also despite plaintiffs' timely motion for a new trial, amendment of findings, making of additional findings, and amendment of judgment. In so doing, the Court of Appeals ignored the fact that under Federal Rule 52(a) and (b) the petitioners were under no obligation whatever to make any requests for new or different findings or to object to those authored by Humble's counsel, as the prerequisite to a challenge of the latter on this appeal.

This whole question of whether the trial judge must decide the case and state the grounds of his decision as a result of his own judicial action, or whether he can simply make an off-hand reference to other irrelevant and unproven prior litigation, and then leave the entire decision of the case and the determination of the grounds therefor to winning counsel, goes to the very heart of the judicial process in the Federal Courts and squarely raises the question whether the losing litigants have been deprived of their constitutional right to due process of law.

Thus the Court of Appeals has erroneously decided an important question of substance under Federal law which ought to be decided by this Court.

Both the trial court and the Court of Appeals distorted the plain provisions of the unambiguous mineral lease between the parties, as well as the two separate unambiguous contracts for the purchase and sale of oil owned by

plaintiffs, and misapplied the law of Texas thereto in such a manner as to deprive plaintiffs not only of their mineral rights worth many millions of dollars, but also of their rights to compensatory damages and other relief because of Humble's plain breaches of both the mineral lease and the two contracts.

This petition for certiorari is not the place for us to elaborate upon these important questions of the local law of Texas which are outlined above and which were erroneously decided, in violation of Federal law, by both the District Court and the Court of Appeals in a manner directly in conflict with the applicable Texas statutes and decisions. The proper forum for that determination obviously is the District Court, to which this cause should therefore be returned for that purpose. *Commissioner* v. *Duberstein*, 363 U.S. 278, at 292-3.

The trial judge having abdicated his judicial function in violation of Federal law, thereby depriving plaintiffs of due process of law, and the trial judge's decision having contravened the applicable Texas statutes and decisions, also in violation of Federal law, the judgment based upon conclusions of fact and law authored only by winning counsel should be reversed and the cause remanded to the District Court. Obviously that is the only court which can and should determine the facts and then decide the important questions of local Texas law outlined above. In other words, due process of law requires not only a trial but also a judicial decision of both facts and law *in the trial court*, and unless and until this is done no action by the Court of Appeals can supply this omission. *Commissioner* v. *Duberstein, supra.*

CONCLUSION.

Petitioners recognize that the granting of this Petition for Certiorari is discretionary with the Court, and that such writ will not ordinarily be granted merely because of error by the District Court or the Court of Appeals, unless such error controverts fundamental Federal law.

In the case at bar, however, the trial judge has entered a judgment which is not based upon his own judicial decision, and which contravenes the local Texas statutes and decisions, in both of which respects the judgment is a violation of fundamental Federal law.

The Court of Appeals, in affirming the District Court's judgment upon the fallacious grounds set forth in its opinion, has decided important questions of Federal law in a way in conflict with applicable decisions of this Court.

The violation of Federal law is therefore so plain and undeniable in this case that petitioners submit that this case calls for an exercise of this Court's power of supervision, and that the Court should grant the prayer of the present petition accordingly.

PRAYER FOR PETITION FOR WRIT OF CERTIORARI.

Wherefore, Petitioners pray for the issuance of this Court's writ of certiorari to review and reverse or vacate the judgment of the Court of Appeals for the Fifth Circuit in the case of *Edwin K. Atwood, et al.* v. *Humble Oil & Refining Company*, 338 F. 2d 502, and to remand the case to the District Court for further proceedings in that court, to the end that petitioners' federal and constitutional rights herein claimed may be effectuated.

Respectfully submitted,

DAVID BLAND
SIDNEY FARR
Attorneys for Petitioners, Edwin K. Atwood, et al.

Of Counsel:

BARROW, BLAND, REHMET & SINGLETON
12th Floor, The Main Building
1212 Main Street
Houston, Texas